

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CARSON INDUSTRIES, INC.,

Plaintiff,

v.

AMERICAN TECHNOLOGY
NETWORK, CORP.,

Defendant.

Case No. [14-cv-01769-NC](#)**ORDER GRANTING PARTIAL
SUMMARY JUDGMENT TO
CARSON RE: 90 GOGGLE KITS IN
INVOICE 3245**

This order for partial summary judgment supplements the Court's first order granting in part summary judgment to Carson. As explained in the first summary judgment order, this is a breach of contract case arising from the sale of night vision goggle kits and lenses by Carson to ATN. In the first order, the Court granted partial summary judgment to Carson on its sale to ATN of 463 goggle kits and 10 lenses in the total amount of \$280,795.35. Dkt. No. 81, 9/25/2015 order.

Now the Court considers whether it should enter summary judgment against a counterclaim by ATN that it paid for but did not receive from Carson 90 goggle kits in September 2010. This shipment was addressed in Carson's first summary judgment motion, ATN's opposition, and in Carson's motion in limine number 7 seeking to exclude evidence about this shipment. Dkt. Nos. 62, 67, 84. The Court also discussed the 90-unit evidence during the pretrial conference on September 30, 2015. The Court permitted ATN

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1 until Friday, October 2, at 5:00 p.m. to identify admissible facts in opposition to Carson's
2 motion in limine. Dkt. No. 89. ATN did not file a timely response, and did not seek leave
3 to file a late response.

4 Under Federal Rule of Civil Procedure 56(f)(3), the Court may consider summary
5 judgment on its own after identifying for the parties material facts that may not be
6 genuinely disputed. Here, Carson's first summary judgment motion and motion in limine
7 number 7 gave ATN notice of the following facts. Attached to the declaration of Richard
8 J. Barrett are documents showing that on September 14, 2010, Carson shipped 90 goggle
9 kits to ATN. Dkt. No. 63-1, filed 7/24/2015. Carson submitted a packing slip (number
10 11031), an invoice (number 3245) for 90 goggle kits at \$599.45 per unit for a total of
11 \$53,950.50, an accounts receivable summary for that same amount, and a record that ATN
12 paid for the shipment in full, with a payment of \$53,950.50. Dkt. No. 63-1 at Exs. 5, 6.

13 ATN has not presented facts establishing a material dispute. Accordingly, the Court
14 grants summary judgment in favor of Carson on ATN's counterclaim asserting that ATN
15 paid for but did not receive 90 goggle kits in September 2010. To be clear, this order does
16 not result in a finding of additional liability by ATN. As to the 90-unit shipment, the Court
17 finds that ATN both received and paid for the goods it ordered.

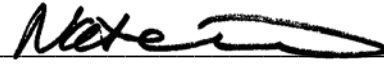
18 Finally, while ATN has not presented admissible facts to rebut summary judgment,
19 it has made repeated arguments that the evidence presented by Carson is fraudulent. Dkt.
20 Nos. 76 (notice of intent to file motion for sanctions), 95 (opposition to motion in limine),
21 99 (notice of inability to file motion for sanctions). Twice in the past 15 days ATN's
22 counsel has provided notice that by specified times he would be filing a motion for
23 sanctions. On both occasions, he filed no motion. In the absence of a genuine factual
24 dispute, summary judgment is appropriate.

25 The Court therefore GRANTS partial summary judgment in favor of Carson and
26 against ATN on ATN's counterclaim that it paid for but did not receive 90 goggle kits
27 referenced in invoice number 3245 in September 2010.

28 The Court will issue a separate order identifying the issues to be tried in the case.

IT IS SO ORDERED.

Dated: October 6, 2015



NATHANAEL M. COUSINS
United States Magistrate Judge

United States District Court
Northern District of California

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